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IN THE
Supreme Court of the United States
October Term, 1966

No. 371

CROWN COAT FRONT CO., INC.,
Petitioner,
v.

UNITED STATES.

**On Writ of Certiorari to the United States Court of
Appeals for the Second Circuit**

**BRIEF OF THOMAS KIERNAN AS
AMICUS CURIAE**

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Preliminary Statement

This brief is submitted in the interest of clients who may be affected by the decision in this case. The brief does not discuss the facts of the case before the Court, but is addressed only to the proper interpretation of the six year statute of limitations of the Tucker Act, Act of June 25, 1948, 62 Stat. 971, 28 U. S. C. 2401(a).

Argument

In essence there are two questions before this Court. First of all, does a contractor's claim accrue under the Tucker Act on the date he completes performance, regardless of the subsequent institution of administrative proceedings by him? Secondly, is the running of the statute of limitations upon claims under the Tucker Act tolled during the pendency of proceedings under the disputes clause?

In its decision below, the Second Circuit perpetuated the error previously made by that court in *States Marine Corp. v. United States*, 283 F.2d 776 (2d Cir. 1960), and answered the first question in the affirmative and the second in the negative. It is interesting to note, however, that Judge Friendly, one of the five judge majority, indicated in a separate concurring opinion that the doctrine of *stare decisis* compelled him to agree with the majority because the case was governed by that court's prior decision in *States Marine*. However, if the case were one of first impression,² Judge Friendly indicated he might well have adopted the position of the Third Circuit in *Northern Metal Co. v. United States*, 350 F.2d 833 (3rd Cir. 1963), that the statute of limitations is tolled during the pendency of proceedings under the disputes clause. Had Judge Friendly taken this view, he and the four dissenting judges would have become the majority, overruling the *States Marine* case in favor of the tolling approach in *Northern Metal*.

This Court is not similarly constricted by *stare decisis*—quite to the contrary, a long established line of cases

holds that a contractor-plaintiff's cause of action does not "accrue" within the meaning of the statute of limitations until the date of the final administrative decision denying his claim. In *Nager Elec. Co., Inc. v. United States*, 6 CCH Government Contracts Reporter, ¶80,728 at p. 85,937 (October 14, 1966), the Court of Claims stated:

"In sum, the uniform course of this court's practice has been, ever since the issue first arose, that, for matters required to be processed under a mandatory 'disputes' provision, the judicial claim does not ripen so as to trigger limitations until the duly-invoked decision of the administrative or arbitral board or tribunal (if that determination post-dates completion-and-acceptance). In such a case the claim does *not* accrue on completion or acceptance, but at the later time."

See also *Electric Boat Co. v. United States*, 81 Ct. Cls. 361 (1934), *cert. denied*, 297 U. S. 710 (1936); *Holton, See-lye & Co. v. United States*, 106 Ct. Cls. 477, 75 F. Supp. 903 (1946); *Atlantic Carriers, Inc. v. United States*, 131 F. Supp. 1 (S. D. N. Y. 1955); *Friedman v. United States*, 310 F.2d 381, 385-88 (Ct. Cls. 1962); *Austin Engineering Co., Inc. v. United States*, 88 Ct. Cls. 559 (1939); *Brister & Koester Lumber Corp. v. United States*, 188 F.2d 986 (D. C. Cir. 1951).

This well established interpretation has been accepted and acted upon by the bar and by the business community. Congress has indicated no dissatisfaction with the long standing rule. The government's only authorities to the contrary are *States Marine* and now the Second Circuit's split decision below. These decisions are not only bad law but are inconsistent with public policy.

First of all, such holdings literally turn the disputes clause procedure into a trap for contractors who had acted in unquestioned good faith. By following contractual procedures they may now be barred from pursuing their just claim in court unless a concurrent suit was filed. Secondly, such a rule would in the future flood the Court of Claims and the District Courts with completely unnecessary "protective suits." Such actions would serve absolutely no practical or substantive purpose, would clog already overcrowded dockets, and would unnecessarily increase the cost of government contracting.

Consequently, it is difficult to believe that counsel for the government can be representing the public interest in arguing for a judicial reversal of this long-established rule of law. If such a change were desirable, the change should be made by Congress in a new statute which would put the business community and the bar on notice and which would have only a prospective effect. The change should not be done retroactively by means of a judicial decision which overturns an established rule of law upon which the bar and business community have relied in good faith. Furthermore, the just claims of plaintiff-contractors should not be defeated on such a narrow and inequitable basis since this would only subvert one of the original functions of the Court of Claims—the avoidance of a large number of private bills in Congress for the payment of the debts and obligations of the government.

Regardless of when a cause of action "accrues" under the Tucker Act, *Northern Metal Co. v. United States*, *supra*, indicates that the statute of limitations is "tolled" during

the pendency of administrative procedures under the disputes clause. This view was shared by the dissenting judges on the Second Circuit below, and Judge Friendly also indicated an inclination to adopt such a position had the case been one of first impression. The fundamental justice in such an approach is clear and persuasive.

The Wunderlich Act, Act of May 11, 1954, 68 Stat. 81, 41 U. S. C. §321, which governs the scope of judicial review of agency disputes clause decisions, provides that no suit may be maintained unless the contractor can say that the final administrative decision is arbitrary, capricious, fraudulent, grossly erroneous, or not supported by substantial evidence. But the contractor cannot aver any of these factors until the administrative decision has actually been rendered. See *United States v. Utah Construction Co.*, 384 U. S. 394, 399 (1966).

Furthermore, the government has no countervailing equities mitigating against tolling. Although procedures under the disputes clause are inevitably time consuming, as evidenced by the present case, the government may always move for a prompt hearing or to dismiss for lack of prosecution if delays seem unwarranted. Furthermore, such delay is no true detriment to the government since interest is not allowable on any recovery. There is also no reason to believe that the government's evidence or records becomes stale, lost, destroyed or otherwise unavailable. Thus, it is both fair and logical that administrative proceedings toll the running of the statute of limitations. See *Nager Elec. Co. v. United States*, *supra*.

Conclusion

This Court is respectfully urged to follow the long-established line of cases holding that a contractor's cause of action does not accrue within the meaning of the Tucker Act's statute of limitations until the date of the final administrative decision denying his claim. In the alternative, the Court is respectfully urged to hold that the statute of limitations upon claims under the Tucker Act is tolled during the pendency of proceedings under the disputes clause.

Dated: December 29, 1966

Respectfully submitted,

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